82-1062

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO.:

JOSEPH LEROY ARMSTRONG,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF THE PETITIONER ON COUNTS I AND IV OF THE INDICTMENT.

B. DURING THE TRIAL OF THE PETITIONER, THERE WAS AN AMENDMENT OF THE INDICTMENT OR A FATAL VARIANCE BETWEEN THE CONSPIRACY CHARGED AND THE PROOF ESTABLISHED AT TRIAL.

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PETITION FOR WRIT OF CERTIORARI
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APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, JOSEPH LEROY ARMSTRONG, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on June 28, 1982.

OPINION BELOW

The Court of Appeals entered its decision affirming the conviction of the Defendant at trial. A copy of the decision is attached as Appendix A.

The Court denied Petitioner's petition for rehearing on August 27, 1982. A copy of that order is attached as Appendix B.

JURISDICTION

On June 28, 1982, the Court of Appeals affirmed the conviction of the Defendant at trial. The jurisdictions of this Court is involved under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V

> No person shall be deprived of life, liberty, or property, without due process of law. No person shall be held...unless on a...indictment of a Grand Jury.

UNITED STATES CONSTITUTION, AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation.

STATEMENT OF CASE

The Petitioner was indicted with Clarence Sheppard Davis and James O. Davis and others for conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute in violation of 21 U.S.C.§§846 and 841(a)(1), among other charges.

The genesis of the case began when certain D.E.A. agents approached James Cohron to act as a middle man for Defendant, James Davis. The negotiations fell through but later James Davis and the agents arranged for a sale of cocaine in which Davis would get cocaine from "his source" and sell it to the agents using Cohron as a middle man. James Davis was in contact with Cohron and the agents several times by telephone and in person over a two (2) day period.

Ultimately, on August 22, James O. Davis, Clarence Davis, and Joseph Armstrong arrived at Cohrons home. One of the three (3) men gave Cohron a brown bag containing cocaine. All individuals went inside a bedroom where Cohron and James Davis discussed the delivery of coca-

ine and Cohron's fee in a low tone of voice. Joseph Armstrong stood by the door approximately six (6) feet away. Armstrong while in the bedroom announced to James Davis and Cohron that he did not want to be involved in any delivery of cocaine. Armstrong asked to stay at Cohron's house while the others delivered the cocaine but Cohron infomed him that he would not permit Armstrong to stay in his house while his Wife and children were present.

Clarence Davis, James Davis and Joseph Armstrong entered into the automobile together, and Clarence Davis drove the car while following Cohron to a motel. While parked at the motel, agents approached the car with their badges visible. Clarence started the car up, but did not move the car. Armstrong exited the back seat of the automobile but was detained by the agents. A loaded gun was found in the back seat of the car.

The Petitioner was charged with Clarence Davis, James O. Davis, James Cohron, Gerry Hencye, and William Norrie with conspiracy to distribute cocaine from February, 1980 until August 23, 1980.

By means of a statement of particulars, the Government stated that the conspiracy was conducted in Texas, Alabama and Florida.

Prior to trial, the Court conducted a James hearing. Pursuant to that hearing, it determined that two (2) independent conspiracies existed - one(1) between Hencye, Norrie and Cohron, the other between Cohron, Davis, Clarence and Armstrong. The Court found that sufficient evidence existed to link the Petitioner with the conspiracy and therefore heresay statements of co-conspirators would be admissable against him.

Although the Court subsequently dismissed Hencye and Norrie from the case, they were still included on the original indictment. The indictment was not amended to constrict the parameters of the conspiracy as stated in the indictment. Nor was the indictment amended to show the shorter duration of the conspiracy.

At trial, the proof showed that the conspiracy had fewer participants than alleged in the indictment, covering a smaller geographical area, and was of shorter duration.

At trial, the Petitioner, was convicted of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute. The Petitioner appealled his convictions to the Eleventh Circuit Court of Appeals. That Court sustained the convictions of the Petitioner.

REASONS FOR GRANTING THE WRIT

A.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF THE PETITIONER ON COUNTS I AND IV OF THE INDICTMENT.

During the James hearing, heard prior to trial, the testimony showed that the governments informant, Sarah Smith, said that she traveled with Gerry Hencye and William Norrie to Texas in April of 1980 to get cocaine. During that trip, Hencye informed her that he received cocaine from James O. Davis. Subsequently, James Davis and Smith attempted to negotiate a separate cocaine deal. During none of her encounters, did Smith meet or hear about Petitioner, Joseph Armstrong.

James Cohron testified at the James hearing that he worked for Gerry Hencye and had attempted to set up a deal with James O. Davis. He testified that neither Hencye or Norrie knew the Petitioner. Furthermore, Cohron testified that he did not know of nor met Petitioner, Armstrong, until August 22, 1980.

During the trial, the Court held another James hearing. During that hearing the Court

heard testimony concerning the series of events which occurred on August 22, 1980 at Cohrons house and at the subsequent place of their arrest which was enumerated in the Statement of Facts.

Based upon these facts, the Court held that a substantive and independent conspiracy existed between Cohron, James O. Davis, Clarence Davis and Joseph Armstrong.

The Fifth Circuit Court of Appeals set the standards for the burden of proof to allow introduction of hearsay statements of alleged co-conspirators and to sustain a conviction for conspiracy in U.S. v. James, 590 F2d 575 (5th Cir.), cert denied, 442 U.S. 917 92 S.Ct. 2836, 61 L.Ed.2d 283 (1979) and U.S. v. Grassi, 616 F2d 1295 (5th Cir. 1980).

Under this standard, the trial court must first determine if there is sufficient evidence of conspiracy and secondly, if the non-hearsay evidence linking the Defendant to the conspiracy is substantial.

If the testimony presented at the James hearing is sufficient under this standard, then

heresay statements of co-conspirations may be admissible against the Defendant when the declaration is made by a co-conspirator, during the course of the conspiracy, and in furtherance of the conspiracy. Grassi, supra at 1300.

Grassi establishes the principal that a judge must review the independent evidence at the conslusion of the trial as to whether or not the government has by independent evidence demonstrated the Defendant's participation in the conspiracy.

The Government must prove beyond a reasonable doubt that (1) a conspiracy existed, (2) the Defendant knew of the existance of a conspiracy and (3) with that knowledge, the Defendant voluntarily joined the conspiracy. U.S. v. Gutierrez, 559 F2d 1278 (5th Cir 1977).

In taking into consideration the third element of a conspiracy, Courts have consistently held that a person does not become a co-conspirator simply by virtue of knowledge of the conspiracy and association with the conspirators. U.S. v. Grassi, (supra).

As the Eleventh Circuit Court of Appeals noted in its opinion in this action, the essential facts which sustained the Defendant's conviction were that (1) Armstrong accompanied Clarence Davis and James O. Davis to Cohron's home. (2) He was present in Cohron's bedroom when James Davis and Cohron discussed the details of the sale of the cocaine although he took no part in the discussions and no testimony was offered that Armstrong heard the discussion. (3) Armstrong asked Cohron if he could stay at Cohron's house because he did not want to be involved in the delivery of the cocaine and Cohron refused. (4) Armstrong was in the backseat of the motor vehicle carrying James O. Davis and Clarence Davis which followed the automobile containing Cohron who went to consumate the sale of cocaine. (5) Armstrong started to walk away when D.E.A. agents approached the automobile containing Armstrong and the Davis's. (6) A firearm was found in the backseat of the automobile although there was no showing that it belonged to the Defendant, Armstrong. (at page 1886)

The Eleventh Circuit in its opinion stated that Armstrong's presence in Cohron's house where the cocaine was weighed and the details of the sale discussed coupled with the fact that Armstrong wanted to wait at Cohron's house while the others delivered the cocaine showed that Armstrong knew that (1) a conspiracy to distribute cocaine existed and (2) Armstrong knew of it.

Even if one concedes that the foregoing facts establish the first two (2) elements of a conspiracy, those facts fall woefully short of establishing beyond a reasonable doubt that Armstrong agreed to participate in the conspiracy. The Eleventh Circuit Court of Appeals decision conflicts with several other cases which have considered like cases.

In U.S. v. Reyes, 595 F2d 275 (5th Cir. 1979), the Defendant was indicted in the Middle District of Florida for conspiracy to import marijuana and importation of marijuana in violation of 21 U.S.C.§§952(a) and 960(a)(1) and 963. They were subsequently convicted of those charges.

The evidence at trial showed that the air traffic controller at Tampa International Airport picked up a signal from a transponder on an airplane located approximately 45 miles off the coast of Florida. The airplance did not respond to raido contact and was tracked in an erratic course for almost three (3) hours. Customs agents in a plane followed the airplane as it landed at the St. Petersburg-Clearwater airport and taxied off the runway. Agents immediately approached the plane and discovered the Defendant and four (4) others inside it.

In examining the airplane, the agents discovered that the number on the airplane had been altered, the door of the aircraft and the interior were smeared with pineapple, pieces of rope were found inside the plane along with a Columbian newspaper, and the Defendant's themselves were Columbians. In vaccuming the floor of the plane, marijuana was discovered. Furthermore bales of marijuana were found floating in the Gulf of Mexico wrapped with rope which was similar to that found in the plane and which were located near the course of the flight of the

airplane.

The Defendant's appealed their conviction of both charges and the Fifth Circuit Court of Appeals reversed stating that there was insufficient evidence to sustain the conviction. The Court reasoned that although the evidence showed that a conspiracy to import marijuana existed, between all four (4) defendant's existed and inferred that the Defendant's knew of the existance of that conspiracy.

However, the Court focused its attention on the fact that there existed no direct testimony that any of the Defendant's pushed the marijuana bales into the Gulf and then smeared the pineapple in the plane to mask the odor of the marijuana. Although the Court conceded that the Defendants may possibly have participated in the acts in furtherance of the conspiracy, the Court noted that the government did not show beyond a reasonable doubt that "one or more defendants went along for the ride." at page 281.

Similarly in U.S. v. Grassi, 616 F2d 1295 (5th Cir. 1980), Defendant Grassi was charged

and convicted of conspiracy to distribute unregistered handguns. At trial, the evidence showed that D.E.A. agents met with a person named Watson who introduced the Defendant to him. Initially, Defendant Grassi showed interest in distributing marijuana. However, on one occassion Grassi was at a meeting with agents and other co-defendants in which the sale of silencers was discussed with certain co-defendants. Grassi was present during these conversations, knew the participants, listened to them, but did not participate in the discussion.

Prior to trial, the Court held a James hearing which showed no evidence that Defendant Grassi intented to participate in the cnspiracy to distribute firearms. The Court, however, held that Grassi's participation in the conspiracy was sufficient to allow co-conspirator's statements against him.

In reversing Defendant Grassi's conviction on that charge, the Fifth Circuit stated that one does not become a co-conspirator simply by virture of knowledge of a conspiracy and assoc-

iation with the conspirators. The Court also stated that:

> "To connect the Defendant to a conspirator, the prosecution must demonstrate that the Defendant agreed with others to join the conspiracy and participate in the achievement of the illegal objective."
>
> Grassi, at 1301

Yet another case on point is U.S. v. Gutierrez, 559 F2d 1278 (5th Cir. 1977). There, the Defendant was charged with conspiracy to distribute heroin and possession of heroin with intent to distribute and was convicted of both counts.

The evidence established that Gonzales, who was Gutierrez's nephew, entered into several arrangements with D.E.A. agents to sell heroin. The agents saw Gonzales go to the Defendant's house before he returned to the agent with the heroin on several occasions. On several occasions, they saw Gonzales talking to the Defendant prior to returning to the agent with the heroin.

The officers never saw any drugs or money pass between Gonzales and the Defendant. After Gonzales was arrested, the agents procurred and got a search warrant of the Defendant's house.

That search revealed $400.00 of marked currency in a bank bag in a chest.

On Appeal, the Fifth Circuit reversed the Defendant's conviction because of the insufficiency of the evidence. The Court noted that even the fact that the Defendant and another acted in close proximity to each other and even if the Defendant is actually present at the scene of the crime, are insufficient to establish a conspiracy.

It should also be noted that it is red letter law that flight alone is not enough to support a finding of guilt. See U.S. v. Caro, 569 F2d 1091 (5th Cir. 1978); U.S. v. Flores, 564 F2d 717 (5th Cir. 1977).

Other case relevent as to the sufficiency of evidence in a conspiracy are U.S. v. Littrell, 574 F2d 828 (5th Cir. 1978); U.S. v. Soto, 591 F2d 1091 (5th Cir. 1979) (where the Defendant was talking to two (2) conspirators who were involved in a off-loading venture, walked away when an agent approached him, and had a gun in his back pocket); U.S. v. Olivia, 497 F2d 130 (5th Cir. 1974); and U.S. v. Martinez 486 F2d

15 (5th Cir. 1973).

The Eleventh Circuit in its opinion noted that the trial jury could infer that Armstrongs preference to stay at Cohron's house meant that his job of delivering the cocaine to James Davis was over and that he did not want to incur further risk by being near the scene of delivery. (at page 1888). The Court makes this inference despite the absence of evidence that indicated that Armstrong, in fact, delivered cocaine to Cohron. The evidence, in fact, suggests that Clarence Davis brought the cocaine to James Davis.

The Eleventh Circuit in its opinion also stated that a jury could "reasonably infer that Armstrong was avoiding arrest" when he left the automobile after the agents approach. (at page 1888). The Court further inferred that the gun found in the back seat indicated that "Armstrong knew he was involved in an illegal transaction and was protecting his interest in the conspiracy". (at page 1888). Lastly, the Court inferred that the evidence supported Armstrong's conviction for possession of cocaine with intent to distribute because he was with Clarence

Davis and James Davis when the cocaine was weighed and because he was with them when they followed Cohron to the motel. The Court finally stated that "the jury could infer from the loaded gun that Armstrong was protecting his interest in the cocaine." (at page 1889).

There was no evidence which would suggest that the Petitioner had control over the illegal substance although the Petitioner concedes that evidence of knowledge was present. Because of this, there was not sufficient evidence which would sustain a conviction for constructive possession of cocaine.

The Petitioner suggest that the evidence could as easily infer that the Petitioner was simply a by-stander who did not know of the conspiracy until he was in Cohron's house, attempted to disassociate himself from the others but could not, and was only present at the time of arrest because Davis' automobile was his only means of transportation.

As the U.S. Supreme Court has stated in Ingram v. U.S., 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959), "Charges of conspiracy

are not to be made out by piling inferences upon inferences."

It is exactly that principal which the trial court allowed when it refused to grant to the Petitioner a judgment of acquittal and which the Eleventh Circuit sustained it its decision.

B.

DURING THE TRIAL OF THE PETITIONER, THERE WAS AN AMENDMENT OF THE INDICTMENT OR A FATAL VARIANCE BETWEEN THE CONSPIRACY CHARGED AND THE PROOF ESTABLISHED AT TRIAL.

The Grand Jury, after hearing testimony presented by the Government, chose to allege that the Petitioner along with Clarence Davis, James Davis, Cohron, Hencye and Norrie conspired to distribute cocaine over a seven (7) month period of time in a multistate operation.

After the James hearing prior to trial, the trial Judge suggested to the Government that it seek an amended indictment since the proof at that hearing showed that two (2) separate conspiracies existed. Instead of doing this, the Government sought the Court to dismiss the indictment against Hencye and Norrie.

Outside of those dismissals, the indictment remained the same as when it was originally drafted.

In addition, the Government in responding to a Request for a Bill of Particulars stated that the conspiracy took place in Florida, Alabama, and Texas.

As stated previously in this petition, the Government's proof at trial was limited to the events which occured on August 22, 1980, in the State of Florida.

On Appeal, the Eleventh Circuit Court of Appeals ruled that the proof at trial did in fact vary from that alleged in the indictment. However, the Court held that a constructive amendment of the indictment did not take place. The Court did rule that a non-prejudicial variance of the indictment did occur.

Although the Court conceded that the proof at trial varied from that alleged in the indictment in that the evidence showed a conspiracy which involved fewer people, of shorter duration and in a smaller area, the Court held that it gave sufficient notice to the Petitioner of the charges against him. (at page 1886).

The Petitioner disagrees with the Eleventh Circuit's opinion and respectfully suggests that the Defendant's fundamental right to a fair trial and his right to trial only upon an indictment by a Grand Jury both guaranteed to him by the Fifth Amendment to the United States Constitution was violated. This issue also violates the Defendant's Sixth Amendment right to be adequately apprised of the crime charged. Other Circuit's who have considered these issues have reached different conclusions than that of the Eleventh Circuit in the case at bar.

The fundamental principal concerning this issue is that an amendment to an indictment is prejudicial per se whereas, a variance between the allegations of the indictment and the proof at trial is subject to the harmless error rule. See Watson v. Jago, 558 F2d 330 (5th Cir.1977).

The starting point for any analysis of this issue begins with Ex Parte Bain, 121 U.S. 1, 7 F.S.Ct. 781, 30 L.Ed. 849 (1887). In Bain, during trial, the Court struck certain words from the indictment because the Court felt that they were material. The Defendant was ultim-

mately convicted. However the U.S. Supreme Court granted a writ for habeas corpus and held that a Defendant could only be tried upon the indictment as found by the Grand Jury and that language in the charging part could not be changed without rendering the indictment invalid.

Bain involved a situation where the indictment was literally amended. Approximately, seventy-five (75) years later the U.S. Supreme Court considered a situation where an indictment was constructively amended in Stirone v. U.S., 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 2d 252 (1960).

In Stirone, the Defendant was indicted for unlawfully interfering with interstate commerce in violation of the Hobbs Act. The indictment charged that the Defendant caused to move sand in interstate commerce between various points in the U.S. and Pennsylvania. However, at trial, the Government also submitted evidence of the effect on interstate commerce involving steel shipments from steel plants in Pennsylvania into Michigan and Kentucky. In addition, the Court instructed the jury as to these steel shipments.

In considering these facts, the U.S. Supreme Court reversed the Defendant's conviction and held that the basic protection the Grand Jury was designed to afford Defendant's is defeated when the Government subjects the Defendant to prosecution for crimes which the Grand Jury did not charge. Because of this, the Defendant was convicted of a charge which the Grand Jury never made against him.

The hallmark case concerning variances is Berger v. U.S.,235 U.S. 78, 55 S.Ct. 629 (1935). There, a Defendant was indicted and convicted of conspiracy to utter counterfeit notes. Three (3) other individuals were named in the indictment as co-conspirators.

The evidence at trial showed that there were actually two (2) separate conspiracies with one (1) individual who was involved in both. Although the Supreme Court reversed the Defendant's conviction on other grounds, the Court held that a variance between the allegations contained in the indictment and the proof proved at trial, this variance was not material in that the proof at trial established a conspiracy against only one of them. The

Court did note that a variance is filled where an indictment charges one (1) large conspiracy and the proof shows two (2) different and distinct smaller conspiracies provided that Defendant's substantial rights have been prejudiced.

The major case involving the Defendant's Sixth Amendment right to be informed of the nature and cause of the accusation is Russell v. U.S., 369 U.S. 749, 8 L.Ed.2d 240, 82 S.Ct. 1038 (1962). There the Defendant refused to answer certain questions pro-pounded to him by a Congressional subcommittee. He was indicted and convicted of violation of 2 U.S.C.§192. The indictment, however, failed to identify the subject under congressional subcommittee inquiry at the time the witness was interrogated.

The Court in discussing this matter stated that the sufficiency of an indictment is governed by two (2) criteria. The first is whether the indictment contains all elements of the charge and therefore sufficiently apprises the Defendant of what he must be prepared to meet at trial; secondly, whether the record shows with accuracy to what extent he may plead

former jeopardy.

In using this standard, the Court noted that there was no problem in the indictment concerning the second standard but it did not pass muster regarding the first criteria. (at page 251, L.Ed. 2d)

The Court noted that it was a fundamental principal that an indictment not framed to apprise the Defendant with reasonable certainty of the nature of the accusations against him is defective although it may follow the language of the stature. (at page 251 L.Ed.2d).

In considering the sufficiency of the indictment, the Court reversed the Defendant's conviction because the indictment did not fully apprise the Defendant of the charges against him. In addition to a Sixth Amendment violation, the Court stated that an amendment of the indictment took place at trial. It noted that:

> "[To] allow the prosection, or the court, to make a subsequent guess as to what was in the minds of the Grand Jury at the time they returned the indictment would deprive the Defendant of a basic protection which the guaranty of the intervention of a Grand Jury was designed to secure. For a Defendant could be convicted on the basis of facts not found by, and perhaps not even presented to the Grand Jury which indicted him."

369 U.S. at 770

As the Eleventh Circuit Court of Appeal noted in its opinion the indictment does allege all elements of the charge. The Petitioner's agreement is that he was not apprised as to the crime that he was charged.

While there is an abundance of case law which deals with the situation where the proof at tiral expands the allegations of the indictment and consequently violates a Defendant's constitutional rights, there is little case law which explores the ramifications of proof at trial which contracts the parameters of the indictment. The Petitioner suggest that in cases, where the proof at trial is so much different than that alleged in the indictment that a Sixth Amendment violation occurs.

A case which is somewhat analogous to this situation is United States v. Hinkle, 637 F2d 1154 (7th Cir. 1981). There the Defendant was charged in six counts of an indictment with using a telephone to facilitate acts constituting a felony under 21 U.S.C.§841(a)(1).

None of the counts specify which controlled substance in 21 U.S.C.§841(a)(1) discussed on the telephone. One hundred and forty-two contr-

olled substances are listed in that section. The Defendant was convicted at trial.

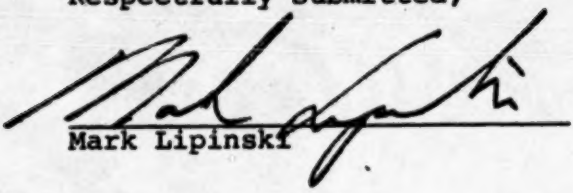
The Seventh Circuit Court of Appeals reversed the Appellant's conviction and held that the Defendant's Sixth Amendment right to be apprised of the charges against her was violated by the over-inclusive indictment. See also Gray v. Raines, 662 F2d 564 (9th Cir. 1981).

Because count Four of the indictment charging the Petitioner with a conspiracy to distribute cocaine in a seven month period occuring allegedly in three (3) states was so overinclusive when compared to the proof established at trial, the Petitioner's Fifth Amendment right to be charged only upon an indictment by a Grand Jury and his right to be informed as to the nature and cause of the crime against him was violated.

CONCLUSION

For the foregoing reasons, Petitioner JOSEPH ARMSTRONG respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,



Mark Lipinski

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO.:

JOSEPH LEROY ARMSTRONG,

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vs.

UNITED STATES OF AMERICA,

Respondent

PROOF OF SERVICE

STATE OF FLORIDA)
) ss.:
COUNTY OF MANATEE)

MARK LIPINSKI, after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the within PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA on counsel for the Petitioner by enclosing a copy thereof in an envelope, first class postage prepaid, adressed

to: Solicitor General of the United States Department of Justice, Washington, D.C. 20530 and to the United States Attorney's Office for the Northern District, P.O. Box 12313, Pensacola Florida, 32581 and depositing same in the United States mails at Bradenton, Florida on the 17th day of December, 1982.

Mark Lipinski, Affiant

Subscribed and Sworn to Before Me
this the 17th day of December, 1982.

Notary Public In and For
Said County and State

Notary Public, State of Florida
My Commission Expires 9/23/85
Bonded by American Fire & Casualty Company

APPENDIX A

UNITED STATES of America,

Plaintiff-Appellee,

v.

Clarence Sheppard DAVIS, Joseph Leroy Armstrong and James O. Davis,
Defendants-Appellants.

No. 81-5465

United States Court of Appeals,
Eleventh Circuit.

June 28, 1982

The United States District Court for the Northern District of Florida, William Stafford, Chief Judge, found defendanats guilty of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute, and defendants appealed. The Court of Appeals, Godbold, Chief Judge, held that defendants were not deprived of their right to speedy trial and that evidence was sufficient to sustain convictions.

Affirmed.

1. Criminal Law -577.10(5)

Where defendants were indicted September 10, 1980, trial was scheduled for November 12, 1980 on which date defendants' counsel and prosecutor informed court that plea had been negotiated, court set hearing for acceptance of pleas on November 13, 1980 at which time two of three defendants changed their minds, and Government was unwilling to accept guilty plea from one defendant and court set trial for January 14, 1981, defendant who was willing to plead guilty was not denied his right to speedy trial. 18 U.S.C.A. §§ 3161(c)(1),(h)(7),(h)(8)(C),(i),3162(a)(2).

2. Criminal Law - 577.12(1)

Rationale of cases holding that government negotiates pleas at its own risk of violating Speedy Trial Act did not apply to case where Government withdrew from plea agreement only because defendant's codefendants withdrew first. 18 U.S.C.A. §§3161(c)(1),(h)(7),(h)(8)(C),(i),3162(a)(2).

3. Criminal Law 1167(1)

Review of record in prosecution on indictment charging defendants with conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute established that proof at trial varied from conspiracy alleged but that defendants were not prejudiced by the variance. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 21 U.S.C.A.§§841(a)(1), 846.

4. Indictment and Information 159(1)

Constructive amendment of indictment occurs when evidence presented at trial and jury instructions so modify elements of offense charged that defendant may have been convicted on grounds not alleged by indictment.

5. Criminal Law 1167(4)

Indictment and Information 159(1)

An amendment of an indictment violates accused's right to be tried solely on allegations returned by grand jury and requires reversal.

6. Indictment and Information 171

Variance results when terms of indictment are unaltered but evidence offered at trial proves facts materially different from those alleged in indictment.

7. Criminal Law 1167(1)

Variance from indictment mandates reversal only when it substantially prejudices defendant's rights.

8. Indictment and Information 159(1)

Government's motion to dismiss two defendants from indictment charging conspiracy to possess cocaine with intent to distribute did not constructively amend indictment. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406,21 U.S.C.A.§846.

9. Conspiracy 23

Existence of conspiracy agreement rather than identity of those who agree is essential element to prove conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

10. Indictment and Information 176

Time is not an essential element of indictment charging conspiracy so long as time frame proved was within period alleged in indictment. Comprehensive Drug Abuse Prevention and Control Act of 1970 §406, 21 U.S.C.A.§846.

11. Indictment and Information 171

Requirement that proof correspond to indictment insures that defendant will be adequately informed of charges to prepare his defense without surprise at trial, and that defendant will not be subject to another prosecution for same offense.

12. Criminal Law 1144.13(3,5)

When determining sufficiency of evidence, appellate court must review evidence in light most favorable to government, accepting all reasonable inferences gathered from direct and circumstantial evidence.

13. Criminal Law 1159.2(7)

Appellate court will sustain conviction if reasonable trier of fact could find that evidence establishes guilt beyond reasonable doubt.

14. Drugs and Narcotics 73

Even though defendant may not have handled cocaine, defendant could be convicted of possession of cocaine where evidence showed he had constructive possession. Comprehensive Drug Abuse Prevention and Control Act of 1970,§401(a)(1),21 U.S.C.A.§841(a)(1).

15. Drugs and Narcotics 123

Constructive possession may be established by evidence showing ownership, dominion or control over contraband itself or premises or vehicle in which contraband was concealed. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1),21 U.S.C.A.§841(a)(1).

16. Conspiracy 40

Possession of drug may be shared among several conspirators, each of whom performs distinct role in transaction. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406,21 U.S.C.A. §§841(a)(1),846.

17. Drugs and Narcotics 123

Evidence which included telephone conversations between defendant and DEA agents, and testimony as to defendant's activities with middleman in drug transaction were sufficient to sustain defendant's conviction on charge of possession of cocaine with intent to distribute. Comprehensive Drug Abuse Prevention and Control ACt of 1970, §401(a)(1), 21 U.S.C.A. §841(a)(1).

18. Conspiracy 47(12)

Evidence which included testimony as to defendant driving alleged drug seller to middleman's house late at night and his activities on night sale was made was sufficient to sustain conviction for conspiracy and possession with intent to distribute cocaine. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1) 406, 21 U.S.C.A. §§841(a)(1), 846.

19. Conspiracy 47(12)

Drugs and Narcotics 123

Evidence as to defendant's activities on night sale of cocaine was made and including his request to remain at middleman's

house during delivery, his exiting vehicle when plain-clothed deputy approached vehicle, and presence of loaded gun in backseat where defendant was sitting was sufficient to sustain convictions on charges of conspiracy and possession with intent to distribute cocaine. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§841(a)(1), 846.

20. Criminal Law 730(8)

Any error arising from prosecutor's alluding to court's finding of conspiracy at James hearing was cured by court's instructing jury that it was sole fact finder as to existence of conspiracy and statements made by counsel were not evidence.

Appeal from the United States District Court for the Northern District of Florida.

Before GODBOLD, Chief Judge, HILL and FAY, Circuit Judges.

GODBOLD, Chief Judge:

Appellants challenge their convictions for conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1). We affirm their convictions.

I.

In the spring of 1980, Sarah Smith began working in drug enforcement with the Escambia County Sheriff's Department in Pensacola, Florida and the Federal Drug Enforcement Agency ("DEA"). Two DEA agents, Warner and Schmidt, posed as Texans looking for a large, continuous supply of cocaine.

In June 1980 Smith approached James Cohron to act as a middleman for her Texan buyers and appellant James Davis. She explained to Cohron that Davis did not want to do business with her directly. Cohron did not make any arrangements with Davis to supply the agents until August; however, he agreed to market some cocaine for Davis in June without Smith's knowledge.

Meanwhile Davis and the agents unsuccessfully negotiated concerning several cocaine transactions. Davis spoke with both DEA agents by telephone in July proposing that they give Smith the money for a kilogram (2.2 lbs.) of cocaine at $2,100 an ounce.[1] Smith would then follow Davis by car to the sellers somewhere in Florida where the exchange would take place. The sellers were located in the eastern standard time zone, and the round trip would take up to 12 hours. The agents did not agree to this plan, claiming they wanted to test the cocaine themselves before they parted with the money.

On August 13 Davis discussed with agents by phone a plan whereby one of the agents would travel with Smith and with someone acting on behalf of Davis to the sellers who lived five hours driving time from Pensacola and 100 miles from Talla-

1 Davis would charge $100 per ounce for his procuring services.

hassee. The agent could then test the cocaine before buying it. The agents again expressed reservations about the plan because of the drive. Davis assured agent Warner that "his man" could be trusted because Davis had known him since the day he was born.

Shortly after this conversation Davis changed the plans by arranging for delivery to the agents in Pensacola, and Cohron began to participate as the middleman. Several days before the proposed delivery date of August 22 Davis drove to Cohron's house and gave Cohron a purported sample of the cocaine the agents would be buying. Cohron reported to the agents that the cocaine was of good quality. [2]

On August 22 Cohron met with Smith and several agents at a restaurant. The agents showed Cohron a suitcase containing $56,000. Cohron and the agents agreed

2. Davis had represented to the agents that the cocaine would be at least 80% pure. The analysis of the cocaine seized from Cohron at his arrest showed it was only 43% pure.

that he would deliver the cocaine to their motel room that evening.

Late that evening there were a series of phone calls between Cohron and Davis, and Cohron and the agents, because Davis was running behind schedule. Davis told Cohron to stall the buyers; the agents kept pressuring Cohron to deliver. Around midmight appellants Joseph Armstrong and Clarence Davis ("Clarence"), Davis' nephew, arrived at Davis' house in an Oldsmobile that belonged to a woman in Cross City, where Clarence lived. They stayed at the house about 10 minutes and left with Davis in the Oldsmobile. They drove to Cohron's house. Cohron met them at the door, and one of the three gave him the cocaine in a plastic bag inside a brown paper bag. Davis introduced Clarence and Armstrong to Cohron, who had never met the two. All four went into Cohron's bedroom. Davis and Cohron stood by the dresser while Cohron took the cociane out of the bag and weighed it. Clarence and Armstrong stood

by the door about six feet away watching. Cohron discussed with Davis the delivery and Cohron's fee. Davis permitted Cohron to take out one-half ounce as part payment for his participation.

Cohron expressed fear that he might be robbed by the buyers. Davis indicated that he would be nearby in case anything happened. Armstrong told Cohron that he did not want to be involved in the delivery and asked permission to wait at Cohron's house. Cohron refused but suggested that Armstrong wait at a restaurant.

Cohron then headed for the motel driving his own car. Appellants followed in the Oldsmobile driven by Clarence. While Cohron went to the agents' room, appellants parked their car in a gas station across the street from the motel to watch. Cohron was promptly arrested inside the room. As sheriff deputies drove to the gas station to arrest appellants, Armstrong exited from the back seat of the car and began walking away. One of the deputies ordered him to

stop. Clarence started the car, and Davis got out. The deputy and Davis struggled over a gun Davis carried in a holster. After Davis was subdued the deputy ordered Armstrong to walk back to the car. The deputy then saw Armstrong drop a film canister later found to contain a small amount of cocaine and attempt to kick it away. Armstrong was also carrying another small container that held baking soda. A loaded pistol resting in its case was found on the back seat of the seat of the Oldsmobile.

II.

Appellant James Davis asserts failure to comply with the Speedy Trial Act. All appellants challenge the indictment, the sufficiency of evidence and a prosecutorial remark.

(A) Speedy Trial Act

The Speedy Trial Act, 18 U.S.C. § 3161 (c)(1), requires a defendant to be brought to trial within 70 days of his indictment. Appellants were indicted September 10, 1980.

On the day of trial counsel for appellants[3] and the prosecuting attorney informed the court that a plea had been negotiated, and the court scheduled for November 13, 1980 a hearing to accept the pleas. On the day of the hearing Clarence and Armstrong changed their minds and decided to go to trial with different counsel. Although Davis was still willing to plead guilty the government insisted that the plea bargain had been conditioned upon all appellants pleading guilty to spare the expense of trial and withdrew its plea offer to Davis.

The court rescheduled the trial for all defendants for January 14, 1981, finding the time between November 13 and January 14 excludable for purposes of calculating the Speedy Trial Act deadline. The court stated that court space and personnel were unavailable to accommodate the sud-

3 During pretrial appellants were all represented by the same counsel.

den change in pleas until January and that the ends of justice served by granting a continuance outweighed the interest of the public and of the appellants in a speedy trial.

Davis contends that the delay caused by the plea changes cannot be attributed to him because he remained willing to perform the plea agreement. Because he was not brought to trial by November 20, 1980 - 70 days from indictment - Davis argues that §3162(a)(2) mandates the dismissal of the indictment against him.

[1] The Act lists several conditions under which time may be excluded from the 70-day computation. Section 3161(h)(7) excludes a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." We find no violation of the Act. The time had not run for Davis' codefendants, and the two-month delay for Davis was reasonable.

First, we consider the requirement of § 3161(h)(7) that the time had not run for the codefendants. Although general congestion of the court's calendar is an insufficient excuse for delay under the Act, § 3161(h)(8)(C), the circumstances surrounding the change in trial dates justify our attributing the delay to Clarence and Armstrong. The court cancelled the original trial date after all appellants represented that they had agreed to plead guilty. When Clarence and Armstrong refused to plead, the trial could not be worked back into the court's calendar until January 14, 1981. In addition, Clarence and Armstrong needed time to secure new counsel. [4]

The decision by Clarence and Armstrong not to plead guilty is analogous to a defend-

4 Although the district court did not cite the necessity for Clarence and Armstrong to obtain new counsel as a reason for granting the continuance, we note that a substitution of counsel was not filed until December 18, 1980.

ant's withdrawing a guilty plea. Section 3161(i) provides that when a defendant's time for trial has elapsed because he pleaded guilty and then subsequently withdrew the plea, the 70-day time period runs anew from the date of the court order permitting the plea withdrawal. Had the district court taken the pleas of Clarence and Armstrong on the day counsel informed the court of the pleas, and permitted them to withdraw their pleas the next day, the time for a speedy trial would have been extended to January 22, 1981, 70 days from November 13, 1980. Instead the court allowed Clarence and Armstrong an additional day, perhaps to work out some remaining details of the plea agreement or to insure that they had enough time to be certain. It would be incongruous for the Act to extend a defendant's time for trial 70 days when the defendant formally withdraws the plea but to require dismissal of the indictment when a defendant withdraws a tentative plea.

If we did not exclude from the 70-day computation the delay caused by Clarence's and Armstrong's change of mind, defendants seeking plea bargains would suffer. Courts would impose a strict deadline on accepting guilty pleas,[5] and defendants would have less time in which to make a decision

We need comment only briefly on the second requirement of § 3161(h)(7) - that the period of delay is reasonable. The two-month period necessary for the court to conduct previously scheduled trials and for Clarence and Armstrong to obtain new counsel was reasonable. Davis' ability to defend himself was not prejudiced by this delay.

[2] The cases cited by Davis for the

5 The district court's pretrial order in this case required guilty pleas to be entered by November 4, 1980, although the court did not enforce this provision.

proposition that the government negotiates pleas at its own risk of violating the Act are inapposite. In U.S. v. Varini, 562 F.2d 144 (2d Cir. 1977) and U.S. v. Roberts, 515 F.2d 642 (2d Cir. 1975), the government required the defendant to withhold his plea until he performed his part of the bargain, such as maintaining good behavior for an extended time period, Carini or testifying at his co-conspirator's trial, Roberts in both cases the bargain fell through more than a year after the defendant's time for trial had passed, and the defendant did not cause the bargain to fail. The courts held that when the government deliberately prolongs a defendant's case for its own benefit, it does so at its own risk. The rationale of these cases does not extend to the facts of this case, where the government withdrew from the plea agreement only because Davis' co-defendants withdrew first. The government did not delay the time for Davis to plead guilty pending fulfillment of a condition from which the government benefited.

In addition, trial commenced only 25 days after the time had run.

(B) Indictment, amendment or variance

The indictment charged appellants and three others - Cohron, Gerry Hencye and William Norrie-with conspiracy to distribute cocaine from February 1980 until August 23, 1980 in the northern district of Florida and other places. The government further alleged, in answer to a bill of particulars, that the conspiracy was conducted in Texas, Alabama and Florida.

On November 7, 1980 the district court conducted a James[6] hearing to determine if there was sufficient independent evidence that the alleged conspiracy existed prior to the court's permitting the introduction at trial of co-conspirator's statements. Smith testified that she traveled with Hencye and Norrie to Texas in April 1980 to sell cocaine. During that rip Hencye told her

6 U.S. v. James, 590 F.2d 575 (5th Cir) cert. denied, 442 U.S. 917, 99S.Ct. 2836, 61 L.Ed. 2d 283 (1979).

that he received the cocaine from Davis. Smith further stated that in May she asked Davis if he would sell her cocaine without Hencye, and Davis told her that Hencye owed him a lot of money from the previous cocaine transaction. According to Smith, Hencye and Norrie did not participate in the transaction for which appellants were arrested and the two did not know Clarence and Armstrong. Smith had never met Clarence or Armstrong, either.

Cohron testified that he cut cocaine for Hencye until January of 1980.[7] Norrie would sometimes deliver cocaine from Hencye and Norrie played no part in the August 22 transaction and that they did not know Clarence and Armstrong.

The district court tentatively held that the government had shown the existence of two separate conspiracies, one between Hencye, Norrie and Cohron and one between Cohron, Davis, Clarence and Armstrong. He further held that no co-conspir-

7 Smith testified that Cohron did not stop working for Hencye until April 1980.

ators' statements would be admissible and suggested that the government dismiss the indictment as drawn.

Some time during the delay between the hearing and the trial, the court dismissed Hencye and Norrie from the case at the government's request. Appellants were tried on the original indictment, which still included Hencye and Norrie as co-conspirators. During the trial the court held another James hearing outside the presence of the jury. This time the government confined the testimony to the events leading up to the August 23 arrests, and the court found that there was substantial and independent evidence that the conspiracy existed.

[3] Appellants assert that the government constructively amended the indictment by dropping Hencye and Norrie. In the alternative they contend that the proof adduced at trial fatally varied from the indictment because the conspiracy alleged was not the conspiracy proved. We con-

clude that the proof at trial varied from the conspiracy alleged but that appellants were not prejudiced by the variance.

[4,5] A constructive amendment occurs when the evidence presented at trial and the jury instructions "so modify the elements of the offense charged that the defendant may have been convicted on a ground not alleged by the grand jury's indictment." U.S. v. Ylda, 653 F.2d 912, 914 (5th Cir. 1981).[8] An amendment violates an accused's right to be tried solely on allegations returned by the grand jury and requires reversal. Stirone v. U.S., 361 U.S. 212, 215-218, 80 S.Ct. 270, 272-273, 4 L.Ed.2d 252 (1960).

8. See Stirone v. U.S., 361 U.S. 212, 80 S.Ct. 270 4 L.Ed.2d 252 (1960) (indictment charged obstruction of interstate commerce in concrete; court charged jury on obstruction of commerce in cement and steel); U.S. v. Figueroa, 666 F.2d 1375 (11th Cir 1982) (indictment charged attempted hijacking by force or violence; evidence showed only use of threats and intimidation); U.S. v. Bizzard, 615 F.2d 1080 (5th Cir. 1980) (indictment charged defendant had placed lives in jeopardy while robbing bank; evidence showed only assault); U.S. v. Salinas, 601 F.2d 1279 (5th Cir. 1979) indictment charged defendants with misapplication of bank funds while acting as bank director and president; jury instructed that defendants could be found guilty if acting as officers, directors, agents or employees).

[6,7] A variance results when the terms of the indictment are unaltered but the evidence offered at trial proves facts materially different from those alleged in the indictment. U.S. v. Salinas, 654 F.2d 319, 324 (5th Cir. 1981). A variance mandates reversal only when it substantially prejudiced a defendant's rights. Berger v. U.S., 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314 (1935).

[8-10] The government did not constructively amend the indictment by moving to dismiss Hencye and Norrie from the case. Appellants were charged and convicted of conspiracy to sell cocaine and possession to distribute cocaine. The evidence showed a conspiracy with fewer people, of shorter duration, and in a smaller area, but note of the essential elements was altered. The existence of the conspiracy agreement rather than the identiy of those who agree is the essential element to prove conspiracy. U.S. v. DeCavalcante, 440 F.2d 1264, 1272 (D.C.Cir.1971).[9] Neither is time an essen-

9. In DeCavalcante, the indictment included as co-conspirators "persons whose names are to the Grand

tial element so long as the time frame proved was within the period alleged in the indictment. Russell v. U.S., 429 F.2d 237, 238 (5th Cir. 1970). The geographic location of the conspiracy proved at trial was also within the boundaries set by the indictment.

[11] Although the government did not alter the basic conspiratorial agreement for which appellants were indicted to the extent of a constructive amendment, the proof at trial varied from the indictment. The requirement that proof correspond to the indictment insures that (1) the defendant will be adequately informed of the charges to prepare his defense without surprise at tiral; and (2) the defendant will not be subject to another prosectution for the same offense. Berger v. U.S., 295 U.S. at 82, 55 S.Ct. at 630. We focus on whether appellants'substantial rights were affected

Jury unknown." Five months before trial, the government listed two other persons as co-conspirators although evidence about those people had been presented to the grand jury.

by the variance, and we find no prejudice.

Although the indictment was over-inclusive, it gave sufficient notice to appellants of the charges against them. The cocaine transaction for which they were tried was included within the geographic boundaries, timeframe and group of conspirators alleged. No additional evidence was introduced at trial. In addition, the court held a James hearing two months before trial at which the government put on its primary witnesses.

There is also no danger of further prosecution for the same offense because the grand jury reindicted Hencye and Norrie without naming appellants as co-conspirators. See U.S. v. Hencye, 505 F.Supp. 968 (N.D. Fla. 1981).

When the government restricted its evidence to the smaller conspiracy it eliminated the risk that the jury might have transferred guilt from Hencye and Norrie to appellants across the line separating the

two conspiracies.[10] See Kotteakos v. U.S., 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

Appellants' contention that they suffered prejudice because they were prepared to defend against the larger conspiracy but not the smaller one is nothing more than an argument that they had less of a denfense against the smaller conspiracy since the larger one may not have existed. Appellants cannot say that the evidence presented against them came as a surprise.

(C) Sufficiency of evidence

[12,13] When determining the sufficiency of evidence we must review the evidence in the light most favorable to the government, accepting all reasonable inferences gathered from direct and circumstantial evidence. U.S. v. Doe, 664 F.2d 546, 548 (5th Cir. 1981). We will sustain a conviction if "a reasonable trier of fact could

10. The only evidence of the Hencye-Norrie-Cohron conspiracy was introduced during cross-examination of Smith and Cohron by defense counsel.

find that the evidence establishes guilt beyond a reasonable doubt." U.S. v. Bell, ---F.2d ---(5th Cir. 1982) (en banc).

Davis challenges his conviction for possession of cocaine with intent to distribute. He argues that because he was acting as a middleman receiving $100 per ounce, the seller maintained control over the cocaine until Cohron delivered it. Davis also points out that Cohron could not remember which of the three men-Davis, Clarence or Armstrong-handed him the cocaine when he met them at the door.

[14-16] Even if Davis never actually handled the cocaine,[11] the jury could find that he had constructive possession. Constructive possession may be established by evidence showing ownership, dominion or control over the contraband itself or the premises or vehicle in which the contraband

11. Cohron first testified that Davis handed him the cocaine when Cohron met the three at the door. He later equivocated, stating that he could not swear that Davis gave him the cocaine. He assumed that it was Davis because he did not know the other two men.

was concealed. U.S. v. Ferg, 504 F.2d 914, 916 (5th Cir. 1974). Possession may be shared among several conspirators, each of whom performs a distinct role in the transaction. U.S. v. Ramos, 666 F.2d 469, 476 (11th Cir. 1982).

[17] The telephone conversations between Davis and the DEA agents, and Cohron's testimony, indicate that Davis was responsible for bringing the cocaine to Cohron and collecting the money from Cohron after delivery. Davis and Cohron stood together by the bedroom dresser while Cohron examined and weighed the cocaine. Cohron discussed with Davis the Details of delivery and Cohron's fee. Cohron sought permission from Davis to take one-half ounce from the pound of cocaine as partial payment. Davis assured Cohron that he would be around for protection. The jury could also infer from Davis' recorded conversations that Davis followed Cohron to insure safe delivery of the cocaine. We find ample evidence to support Davis' con-

viction for possession of cocaine with intent to distribute.

[18] Clarence Davis attacks his conviction for conspiracy and possession with intent to distribute. The evidence was sufficient to prove beyond a reasonable doubt that Clarence had "the deliberate, knowing, specific intent to join the conspiracy." U.S. v. Morado, 454 F.2d 167, 175 (5th Cir.) cert. denied, 406 U.S. 917, 92 S.Ct. 1767, 32 L.Ed.2d 116 (1972). Clarence drove Davis to Cohron's house late at night. He was present in the bedroom when Cohron unpackaged the cocaine and weighed it. Although Cohron testified that he spoke with Davis in a low voice[12] the jury could conclude that Clarence heard the conversation, especially when Akmstrong who was standing next to Clarence, remarked that he did not want to be involved in the delivery. Clarence drove the car following Cohron to the motel and watched from across the

12. Cohron explained that he did not want his family who were in the next room to hear; he added that he was "not too crazy" about Clarence and Armstrong hearing since he did not know them.

street. When the deputies approached the car with their badges visible Clarence started the car. Finally, when Davis told Warner that he had known "his man" [who would accompany Smith to pick up the cocaine in one of the earlier proposed transactions] since the day he was born, the jury could reasonably infer from this remark that Davis was speaking about his nephew. From these facts the jury could find that Clarence knew Davis sold cocaine and that Clarence voluntarily participated by providing transportation and protection.[13]

We also find sufficient evidence to sustain Clarence's conviction for possession of cocaine with intent to distribute. Constructive possession may be proved by establishing that Clarence delivered the cocaine to Davis from another part of Florida from the following facts. Davis told Agent Warner during one of the phone conversations that good quality cocaine was almost impos-

13. The jury could also have found that Clarence actually supplied or picked up the cocaine from Davis' source in the eastern part of Florida. See discussion infra.

sible to buy in Pensacola because it changed hands too many times from its point of entry into the United States. This problem, Davis explained, made it necessary to travel a great distance in Florida to get the cocaine. Davis mentioned calling his source, who lived in the eastern standard time zone. One of his proposals required the agents to drive five hours from Pensacola or 100 miles from Tallahassee to the supplier. Clarence lived in Cross City, which is in the eastern time zone and is about 100 miles from Tallahassee. Toll records covering several months showed an increased number of calls from Clarence's residence to Davis' home in August.

Davis was delayed several hours in delivering the cocaine to Cohron. Despite the agents' impatience, which Cohron relayed to him, Davis had Cohron stall the buyers, suggesting Cohron tell them "we had a flat in Marianna," a city between Tallahassee and Pensacola. This delay suggests that Davis did not have the cocaine to deliver

yet and that it was coming from the eastern part of Florida. Only after Clarence arrived at his house just past midnight did Davis almost immediately head for Cohron's house with the cocaine. One of the deputies observed that the car's windshield was covered with bugs, indicating recent high-speed driving.[14]

Although the evidence does not confirm that Clarence was the large-scale supplier of cocaine to whom Davis referred, it does establish beyond a reasonable doubt that Clarence procured the cocaine for Davis somewhere east of the Florida panhandle[15] and brought it to Davis on the night of August 22.

[19] Armstrong attacks his convictions for conspiracy and possession with intent to distribute.[16] We uphold Armstrong's

14. Defense counsel argued to the jury that Clarence was probably visiting his parents who lived in Pensacola and merely offered to drive his uncle on an errand without knowing the nature of the trip.

15. The panhandle is a narrow stip of land extending for 200 miles underneath Georgia and Alabama from Tallahassee to Pensacola which forms the northwestern portion of Florida.

convictions because there was sufficient evidence to establish that he knowingly participated in the conspiracy and exercised constructive possession over the cocaine.

Armstrong accompanied Clarence to Davis' house and then to Cohron's house. Although mere presence at the scene of the crime is not sufficient to establish knowing participation,[17] the jury could find that Armstrong voluntarily agreed to participate in the drug conspiracy beyond a reasonable doubt from additional evidence. He followed Davis and Clarence to Cohron's bedroom where Cohron weighed the cocaine and discussed details of the sale with Davis. Armstrong wanted to wait at Cohron's house during the delivery. The remark demonstrates that Armstrong knew a drug transaction was planned. The jury could reasonably interpret Armstrong's preference to mean that having completed the job

16. He does not challenge his conviction for simple possession in violation of 21 U.S.C.§844(a) for the small amount of cocaine found in the film canister.

17. U.S. v. Davis, 666 F.2d 195 (5th Cir. 1982)

of delivering the cocaine from the supplier to Davis, Armstrong did not want to incur further risk by being near the scene of delivery. Armstrong travelled with Clarence and Davis when they followed Cohron to the motel and when they watched the motel from the gas station across the street. Armstrong exited from the back seat when a plain-clothed deputy who was wearing a badge approached the car.[18] The jury could reasonably infer that Armstrong was avoiding arrest. A loaded gun resting in an open case was found in the back seat, indicating that Armstrong knew he was involved in an illegal transaction and was protecting his interest in the conspiracy. See U.S. v. Lippner, 676, F2d 456, 463 (11th Cir. 1982). Armstrong tried to conceal a canister containing a substance later identified as cocaine.

18. Deputy Mooneyham testified that he was the first officer to pull into the gas station in an unmarked car. He remained in the car waiting for a signal from Deputy Cardwell to start the arrest. He observed Cardwell get out of the car and saw Armstrong leave the Oldsmobile "at the same time." Although Cardwell stated on cross-examination that Armstrong left the car before Cardwell pulled into the gas station, the jury could

The same evidence supports Armstrong's conviction for possession of cocaine with intent to distribute. The jury could find beyond a reasonable doubt that Armstrong shared constructive possession of the cocaine with Clarence and Davis, U.S. v. Ramos, supra. Armstrong helped transport the cocaine. He was present when Cohron weighed the cocaine. He accompanied Clarence and Davis when they followed Cohron to the motel to insure safe delivery to the buyers. Finally, the jury could infer from the loaded gun that Armstrong was protecting his interest in the cocaine.

(D) Prosecutorial remark

During trial the court held a James hearing outside the presence of the jury and found that there was substantial and independent evidence that the conspiracy alleged in the indictment existed. Consequently the court ruled that co-conspirators' statements would be admissible.

During the government's direct examina-

resolve the conflict in testimony in favor of Mooneyham.

tion of Smith, defense counsel objected, on grounds of heresay, to Smith's repeating a statement made by Cohron. The assistant U.S. Attorney responded.

> James Cohron was a co-conspirator, Your Honor. I believe you made a finding in the record with respect to that.

Defense counsel unsuccessfully moved for a mistrial because the prosecuting attorney had inadvertently informed the jury that the court had already found the existence of a conspiracy.

[20] Even if the jury grasped the significance of the remark, the court cured any possible error by instructing the jury that it was the sole factfinder as to the existence of the conspiracy and that statements made by counsel were not evidence.

III.

The convictions of James Davis, Clarence Davis and Joseph Armstrong are AFFIRMED.

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5465

UNITED STATES OF AMERICA, Plaintiff-Appellee,

verses

CLARENCE SHEPPARD DAVIS and
JOSEPH LEROY ARMSTRONG,
Defendants-Appellants.

Appeal from the United STates District Court for the Northern District of Florida

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ON PETITIONS FOR REHEARING

( )

Before GODBOLD, Chief Judge, HILL and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the Petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

s/ James Stafford
United States Circuit Judge

Filed August 27, 1982

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5465

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

verses

JAMES O. DAVIS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 28,, 11th Cir., 1982, _____F.2d____)

Before GODBOLD, Chief Judge, HILL and FAY, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ James Stafford
Untied States Circuit Judge

Filed August 27, 1982